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SUB-COMMISSION ON PREVENTION OF DISCRIMINATION
AND PROTECTION OF MINORITIES

Forty-third session

# SUMMARY RECORD OF THE 25th MEETING
(SECOND PART*)

Held at the Palais des Nations, Geneva,
on Thursday, 22 August 1991, at 8.35 p.m.

Chairman: Mr. JOINET

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The administration of justice and the human rights of detainees

* The summary record of the first part of the meeting appears as document E/CN.4/1991/SR.25.

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(d) THE RIGHT TO A FAIR TRIAL (continued)

(E/CN.4/Sub.2/1991/19 and Add.1, 20, 21, 22, 24, 25, 26, 28, 29, 50, 53, 56; E/CN.4/Sub.2/1991/NGO/18, 19, 28; E/CN.4/1991/18; E/CN.4/Sub.2/1990/10, 30, 32; A/CONF/144/28 and A/CONF/144/INF.2)

1. Mr. TURK, referring to item 10 (d), said that the study undertaken by Mr. Treat and Mr. Chernichenko on the right to a fair trial provided a unique opportunity for the Sub-Commission to look into various important human rights questions in a comprehensive manner; it should be supported very strongly despite the difficulties involved.

2. The experience of many countries throughout the world that were preparing new constitutions showed the importance of taking a comprehensive view of a variety of human rights issues relating to a fair trial, and it was for the United Nations to provide an input for discussions in that context.

3. It would be useful if the study were to address the questions mentioned in the preliminary report (E/CN.4/Sub.2/1991/29) in a manner that would help Governments to develop their legislation and also help practitioners. Thus, the preferred direction of legislation should be defined, and questions raised in the report in a neutral way should at some point take the form of a declaration or set of guidelines.

4. Three examples illustrated the relevance of the proposed study and declaration. First, under certain legal systems, military courts had the power to try civilians. While the International Covenant on Civil and Political Rights did not prohibit such an arrangement, those familiar with the situation saw the disadvantages and human rights problems it raised, for example, in cases involving access to alleged military secrets or national security material. It was absolutely necessary in such situations to guarantee the requirements of a fair trial, and military courts were generally speaking not the best institutions to do so. Second, the right to legal counsel was discussed in the report in the light of the legal precedents of the Human Rights Committee. He suggested that the Special Rapporteurs should pay particular attention to the point when legal counsel became available to a person deprived of his liberty, which should preferably be at the earliest possible stage. Emphasizing that right would contribute to the future development of national legislation. The third example was slightly more theoretical, and referred to the traditional dilemma between the inquisitorial and adversarial systems. Each system had its positive and negative aspects, but the International Covenant on Civil and Political Rights gave support to

the adversarial system in article 14. The Special Rapporteurs should be attentive to the need, especially in the Central and Eastern European countries, to strengthen the adversarial component of legislation, and it would be useful if the study provided guidance for that purpose.

5. In conclusion, he said that the right to a fair trial was a central question in many regards and not only from the human rights point of view. In many States, democratic processes had reached the stage where debate on ways to improve the legal and administrative structures was extremely pertinent, and the court system and guarantees that created a fair trial were central in that respect as well. He hoped the study would progress quickly and enable national legislators to make full use of its content.

6. U TIN KYOW HLAING (Observer for Myanmar) recalled that, in his statement to the Sub-Commission on 14 August 1991, he had referred to the need to relate a country's political, social and cultural conditions to any observations made about it, and had also said that his country had reached a delicate and important phase in its history with changes taking place at both the political and economic levels. The allegation of one non-governmental organization that the judiciary was not independent in Myanmar should therefore be seen in the light of certain factors in order to arrive at a fair and balanced assessment.

7. Immediately after assuming power, the State Law and Order Restoration Council (SLORC) had reinstated an independent judicial system, with the Supreme Court at its apex, by the Judiciary Law of 26 September 1988. The same law had reinstated the civilian courts at the State and township levels as well as the Office of the Attorney-General.

8. While it was true that the State Law and Order Restoration Council retained the power to exercise martial law and that military tribunals had been set up in a number of townships, in practice criminal cases were tried by civilian courts. Only special cases involving offences that posed a serious threat to the security of the State were referred to military tribunals. Despite certain quarters' wilful characterization of that exercise as involving human rights violations, such laws and procedures were required in order to preserve and strengthen the rule of law, the maintenance of public order and the protection of national interests. Persons tried by military tribunals enjoyed full protection by normal legal procedures designed to ensure a fair trial.

9. In reply to the reference that had been made to individuals belonging to the National League for Democracy, he said action had been taken against them for breaking the law. The confrontational attitude and subversive acts of those individuals had endangered the peace and security of the country, and the authorities had had no other alternative than to restrain them under existing law.

10. Mrs. UNDERHILL (International Association of Penal Law) said that she represented two organizations: the International Association of Penal Law and the Institute of Higher Studies in Criminal Sciences. The Institute was a non-profit-making international educational foundation, established by Presidential Decree under Italian law, devoted to the multi-disciplinary study of the criminal sciences. It came under the scientific auspices of the

International Association of Penal Law and was funded by various authorities of Siracusa, with funding for specific programmes provided by the Italian Ministry of Justice.

11. Since its inception in 1972, the Institute had conducted conferences, seminars and meetings of experts on various topics related to criminal justice and human rights, attended by jurists from 79 countries, members of law faculties, universities and other higher academic institutions. It had hosted a number of committees of experts with the United Nations and in conjunction with the Council of Europe. Those committees had been convened to prepare draft international instruments including the United Nations Convention against Torture and the Basic Principles on the Independence of the Judiciary.

12. The Institute and the International Association of Penal Law would hold a conference on criminal justice and human rights for Eastern European countries in the last week of November 1991 in Siracusa, Italy, together with the United Nations Crime Prevention and Criminal Justice Branch. The conference was co-sponsored by the Italian Government, and the Centre for Human Rights had been invited to participate. The topics on the agenda included the independence of the judiciary, the role of lawyers and the role of prosecutors, to be discussed on the basis of standards adopted by the Havana and Milan congresses in 1990 and 1985.

13. In addition, a seminar was scheduled for the first week in December 1991, also in collaboration with the United Nations Crime Prevention and Criminal Justice Branch, on the transfer of enforcement of penal sanctions. The purpose of the seminar was to consider the elaboration of a model agreement in that area, in pursuance of the mandate given by the Havana Congress. The final version of the model agreement was to be submitted to the Ninth United Nations Congress on the Prevention of Crime and the Treatment of Offenders in 1991 through the future Commission on Crime Prevention and Control and the Economic and Social Council. The model agreement would complement already existing model agreements elaborated and adopted by past United Nations congresses in the area of extradition, transfer of proceedings, mutual assistance in criminal matters and the transfer of foreign prisoners.

The meeting rose at 9.05 p.m.